

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

BIG MOOSE, LLC

and

Case No. 15-CA-19735

HUMBERTO RECIO, an Individual

**INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
LOCAL 478 (THE GREEN LANTERN)**

and

Case No. 15-CB-5998

HUMBERTO RECIO, an Individual

*Lindsay Lee, Esq., Zachary Herlands, Esq., and Kevin McClue, Esq.,
for the General Counsel.*

*Allan H. Weitzman, Esq., and Christopher L. Williams, Esq.,
for the Respondent Employer.*

*Louis L. Robein, Esq., and Paula M. Bruner, Esq.,
for the Respondent Union.*

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New Orleans, Louisiana, on April 4 and 5, 2011. Humberto Recio, an Individual, filed the charge in Case No. 15-CA-19735 on September 1, 2010 and amended it on November 30, 2010.¹ Recio filed the charge in Case No. 15-CB-5998 on May 25 and also amended that charge on November 30. Based upon these charges, as amended, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing on December 30.

The consolidated complaint alleges, inter alia, that Big Moose, LLC, the Respondent Employer, violated Section 8(a)(1) of the Act on March 11 by its supervisor, Earl Woods, telling employees that they were not allowed to work for the Respondent Employer because they were not members of IATSE Local 478 (the Respondent Union), and violated Section 8(a)(3) by discharging Recio on March 11 and April 28 because he was not a member of that union. The consolidated complaint alleges that the Respondent Union violated Section 8(b)(1)(A) of the Act on March 13 by its business agent, Mike McHugh, telling employees that they were not allowed to work within the Union's jurisdiction because they were not members of the local union, and violated Section 8(b)(2) by causing or attempting to cause the Respondent Employer to discharge Recio because he was not a member of the Respondent Union.

¹ All dates are in 2010 unless otherwise indicated.

On January 19, 2011, the Respondent Union filed its answer to the consolidated complaint, which it amended on March 23, denying that Woods was its agent, denying the unfair labor practice allegations and asserting, as an affirmative defense, that allegations in the amended charge are time-barred under Section 10(b) of the Act. The Respondent Employer
 5 filed its answer on January 20, 2011, denying that Woods was its supervisor or agent, denying the unfair labor practice allegations and asserting the same Section 10(b) defense as the Respondent Union. At the hearing, the General Counsel and the Respondent Employer, with no objection from the Respondent Union, stipulated that Woods was a supervisor of the Respondent Employer at all material times.

10 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent Employer and the Respondent Union, I make the following

15 Findings of Fact

I. Jurisdiction

20 The Respondent Employer, a limited liability company, is a motion picture production company that produced the movie *The Green Lantern* in and around the city of New Orleans, Louisiana in 2010. The Respondent Employer annually derives gross revenues in excess of \$100,000 from its operations and, during the calendar year preceding issuance of the complaint, purchased and received at its jobsite in New Orleans, Louisiana, directly from outside the state, goods valued in excess of \$50,000. Both Respondents admit and I find that the Respondent
 25 Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

30 II. Alleged Unfair Labor Practices

A. The Evidence

35 There is no dispute that the Respondent Employer was subject to Respondent Union's Area Standards Agreement while filming *The Green Lantern* in New Orleans.² This agreement, which sets forth the terms and conditions of employment for various categories of employees working in the motion picture industry within the Respondent Union's geographic jurisdiction, does not require employers to hire exclusively through a union hiring hall. The Agreement does provide that a party employer shall notify the Respondent Union when working in its jurisdiction and that, upon request, the Respondent Union will supply to an employer a roster of individuals
 40 qualified to perform work covered by the agreement. There is no requirement in the agreement that the employer hire only from this roster and the parties stipulated that the Respondent Union did not operate an exclusive hiring hall. Thus, it is undisputed and the evidence establishes that the Respondent Employer was free to hire employees for *The Green Lantern* directly off the street. The Charging Party also acknowledged that, on this and other films he has worked within
 45 the Respondent Union's jurisdiction, he has not gone through the Union to find employment.

The Charging Party, Recio, is an electrician by trade and has worked in the industry for about 27 years. He is a member of IATSE Local 477 in Florida and has worked in that state and

50 ² This agreement was negotiated by the International Union and the Alliance of Motion Picture and Television Producers and was effective from August 1, 2009 through July 31, 2012.

other locations throughout the country. He works primarily as a rigging electrician, which he described as setting up and moving equipment for the unit that actually shoots the film. He testified that, prior to *The Green Lantern*, he had worked in Louisiana, within the Respondent Union's geographic jurisdiction, since 2004 on approximately seven films. He admitted that, to his knowledge, the Respondent Union had never objected to his employment before the incidents involved here.

Recio testified that his first contact with the Respondent Union's business agent, Michael McHugh, occurred in September 2009 while Recio was working on the set of a film called *Battle Los Angeles* in Shreveport, Louisiana. According to Recio, he told McHugh that he had a transfer card from his home local and that he was interested in working in the Respondent Union's jurisdiction. Recio asked McHugh what he should do to continue working in Louisiana. Recio did not testify as to McHugh's response to this question. But he did testify that, after this conversation, he mailed his transfer card to the Respondent Union.³ Recio admitted on cross-examination that he wanted to transfer his membership because "the film industry in Florida had dried up." After Recio finished working on *Battle Los Angeles*, he was hired to work on the film *Earthbound*, shooting in New Orleans. Recio worked on that film from about January until March when he was hired to work on the Respondent Employer's production. Recio testified that he was hired by Earl Woods, the Respondent Union's Local Best Boy for rigging electricians.⁴ He admitted leaving *Earthbound* before the job ended to take work for the Respondent Employer.

Recio testified that, before going to work on *Earthbound*, he called the Respondent Union's office to tell them he had been hired and to inquire about his transfer card. Recio could not recall the name of the woman he spoke to. He recalled telling her that he had mailed in his transfer card and asked if there was anything else he needed to do to start working on that production. The woman who answered the phone told him he had to complete the transfer process online. Because Recio did not own a computer at the time, he was unable to complete the transfer application while working on *Earthbound*. In any event, there is no evidence that the Respondent Union objected to Recio's employment on that job.

The parties stipulated that Recio worked on *Green Lantern* on March 8 through 11 and then again on April 22, 23, 26 and 28. Woods was Recio's immediate supervisor who would tell him at the end of each day what time to report the next day and where he would be working. Kevin Lang was the rigging gaffer, an admitted supervisor at the top of the chain of command for the rigging electrical crew. Recio testified that both Lang and Woods told him, when he was offered the job, that he would be working the run of the show, which Recio believed was until August. This statement is not confirmed by Recio's "deal memo", the employment contract for union employees in the industry. The deal memo specifically states:

Services are for a minimum period of one day if Employee is hired on a daily basis, or one week if Employee is hired on a weekly basis. There is no other guarantee of the period of services unless otherwise specified, and nothing herein contained shall constitute a "run-of-the-show" guarantee. Oral understandings of any kind are not binding.

³ Recio described a transfer card as a document a union member gets from his local when he wishes to move to another jurisdiction for work. Recio's testimony in this regard is undisputed. The Union's constitution, under which such transfer cards are issued, is not in evidence.

⁴ There is no dispute that Woods was a statutory supervisor for this production.

Recio's deal memo identifies him as a "daily employee." Recio signed a dues check-off authorization for the Respondent Union when he started working on *Green Lantern*. Recio testified that he also paid "quarterly stamps" to his home local in Florida to remain in good standing.

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Recio testified that on March 11, at the end of the day, in the parking lot as people were going home, Woods told Recio that he could no longer use him "as per Mike McHugh", that he could not work until "his paperwork was straightened out." Recio testified that Woods also said that McHugh could make Woods life difficult. According to Recio, none of the other people in the parking lot were close enough to hear this conversation. Recio admitted telling Woods that he would now seek other employment as a semi-professional wrestler.⁵

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Recio testified that he visited the Union's office the next day in an attempt to speak to McHugh. McHugh was not there. Recio was told by one of the women in the office to return on March 17, a Wednesday. Recio returned, as instructed, on March 17. Also there to see McHugh was another traveler from another local, Marvin Hauer. McHugh asked who wanted to go first and Hauer spoke up. After McHugh finished speaking to Hauer about his application for membership in the Respondent local, he turned to Recio. According to Recio, McHugh said, "with you, we have a whole different ball game." McHugh went on to complain about "you guys from Florida coming here and taking work." McHugh told Recio that his transfer card had expired and that he needed to get another one. Recio responded that he was unaware that a transfer card had an expiration date. McHugh then told Recio that he needed to complete his application for membership. When Recio said that he was told he had to go online to complete the application, McHugh said that was incorrect and that he would find out who told that to Recio. After McHugh finished telling Recio what he needed to do to complete his application, Recio said he would have everything completed in a couple days. After further questioning, Recio recalled that McHugh told him he would not be allowed to return to work until his application was complete.

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After this meeting, Recio set about completing the requirements for membership, as explained to him by McHugh. He rented an apartment, signing a lease for one year. He obtained a Louisiana driver's license to establish residency, and he completed the paperwork. Recio testified that he returned to the union office in a few days and handed his application and other documentation, along with his application fee, to the women who work there. Recio testified further that, while awaiting word on his application, he travelled back and forth between Louisiana and his Florida home and tried to find work. He acknowledged seeking work in the movie industry as well as in the semi-pro wrestling arena. According to Recio, during this period local best boy Ferdinand Duplantier offered him a job on the electric rigging crew for a movie being filmed in Shreveport.⁶ Recio testified that he told Duplantier that he could not take the job because McHugh told him he could not work till his paperwork was "straight".

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Recio testified that he called McHugh from Florida after the union meeting at which members were scheduled to vote on his and other membership applications, in late March or April. When Recio asked McHugh if he could return to work, McHugh said, "never in the history of the local has this happened before, but when it comes to your case, it was a 50-50 vote." Recio asked, "does that mean I can go back to work?" McHugh responded that Recio could go back to work as long as he reported to McHugh from show to show. As far as Recio understood,

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⁵ Recio has had a side occupation as a wrestler for many years, going by the name "Rico Moon."

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⁶ Recio had worked for Duplantier on the *Battle Los Angeles* production.

his application was to be re-submitted to a vote at the next membership meeting in June. On April 13, Recio sent an e-mail to the Respondent "confirming" the telephone conversation with McHugh. The e-mail dates the conversation to April 12.

5 Recio testified further that, shortly after his April 12 conversation with McHugh, he called Woods to see if he could get back to work on *Green Lantern*. According to Recio, Woods said he could use Recio and offered him work for four or five weeks. Recio called McHugh soon after this conversation and told McHugh that Woods had offered him work on *Green Lantern*.
 10 McHugh did not object, telling Recio to report to him if anything changed or if he was offered any other jobs. In follow-up testimony to clarify the sequence and date of these conversations, Recio said he spoke to McHugh first, to get clearance to return to work, then spoke to Woods. He did not recall any contact with the Respondent after his conversation with Woods.

15 Before returning to work, Recio called the Respondent's office and asked for a refund of his \$450.00 transfer fee and to withdraw his application. Recio testified that he did this because he needed money to pay bills after being out of work since March 11. Documents from the Respondent's files show the fee was refunded on April 20.

20 The parties stipulated that Recio worked on *Green Lantern* again on April 22, 23, 26 and 28. Recio testified that, on April 28, Woods told him as he was leaving that he would call him that evening. When Woods did call him later, he told Recio he was no longer needed on that production and that, if he could find work elsewhere, to go ahead and take it. In contrast to his first period of employment, Recio was not given any reason for being let go this time. On cross-examination by counsel for the Respondent Employer, Recio admitted telling Woods during this
 25 conversation that he was going to look for work as a wrestler.

On April 15, Recio sent an e-mail to Dan Mahoney, who was identified in the e-mail as Assistant Director of Motion Picture and Television Production for the International Union.⁷ In the e-mail, Recio complained that the Respondent would not let him work even though he had
 30 completed the paperwork required for membership. Recio's complaint in the e-mail appears to conflict with his testimony that McHugh told him on April 12 that he could return to work as long as he reported to McHugh. Recio testified that Mahoney called him a few days later and, after Recio explained his situation (as he described it in his testimony), Mahoney said he would look into it.⁸ McHugh acknowledged receiving a call from Mahoney to inform him that Recio had
 35 complained to the International Union about the amount of work he was getting. McHugh could not recall the date of this call but he believed it was after Recio was let go in April. McHugh denied that Mahoney asked or instructed him to do anything. McHugh did testify that he followed up on this conversation by contacting Woods and/or Dave Dunbar, another supervisor on the production, to determine if there had been any performance problems or other issues
 40 with Recio that caused him to be let go. According to McHugh, Dunbar denied that Recio was let go for any performance or other issues. McHugh testified that Dunbar told him that Recio was an "as-needed" employee and they simply did not need him anymore.

45 The General Counsel also offered testimony from Recio regarding another complaint he made to Mahoney about his treatment by the Respondent Union on May 3, after he was let go

⁷ Recio testified that he was given Mahoney's name as someone to contact by someone he spoke to at the office of his Florida local.

50 ⁸ This testimony regarding the conversation with Mahoney is hearsay which I received over objection based on General Counsel's representation that she was not offering it for the truth of the matter, but only to show Recio's state of mind.

the second time. Recio testified that, in response to this complaint, he received a call from Dale Short, who identified himself as an attorney for the International.⁹ According to Recio, Short told him that he had talked to McHugh and that Recio should return to work because it was alright for him to do so. Short also told Recio that he was going to come to New Orleans to talk to McHugh and that Recio should call him if he had any problems. Recio admittedly did not return to work in Louisiana, despite Short's assurances. At first, Recio said the reason he did not return was because he did not have the money to do so. On further questioning by the General Counsel, he added that it was also because McHugh told him he was not allowed to work. However, on cross-examination by counsel for the Respondent Employer, Recio admitted that it was his lack of money that prevented him from returning to Louisiana to work. Recio filed the instant charge after his conversation with Short.

McHugh, who has been the Business Agent for the Respondent Union since 2005 and a member since 1996, testified for the Respondent Union. According to McHugh, the International Union is comprised of a number of national local unions such as the Respondent Union and Recio's home local in Florida. Although each local has a defined geographic area within which they represent employees and administer the collective bargaining agreement, the members of the various locals are free to work anywhere in the country. McHugh explained that, under the International's constitution and by-laws, a member who desires to work in the geographic jurisdiction of another local is obligated to seek permission of the host local union. Although McHugh testified that such permission is supposed to be in writing, he has on occasion granted permission verbally. The Constitution also contains a procedure for a member of one local to transfer his membership to another. Under this procedure, according to McHugh, a member desiring to transfer would first obtain a transfer card from his home local. The member then deposits the transfer card with the new local and completes whatever application process that local has to become a member. In the case of the Respondent Union, a member seeking to transfer would have to file an application, establish residency within the Respondent Union's geographic jurisdiction, submit references, a resume and a copy of their driver's license and pay a \$450 transfer fee. Once the application is completed, the members of the Respondent Union vote whether to accept the transferring member at a membership meeting. McHugh testified that these requirements regarding work permits and transfers are obligations of membership and not requirements to be hired under the terms of the Respondent Union's collective bargaining agreement with the Respondent Employer or any other employer subject to the area standards agreement.¹⁰

McHugh further testified that the motion picture industry in Louisiana has been booming since the State enacted various tax incentives to encourage filming in the State. According to McHugh, employment opportunities in the industry in Louisiana increased from two or three productions a year, to 50-60 at the time of the hearing in this case. As a result, there has been an increase in the number of individuals seeking transfer to the Respondent Union. As noted previously, the area standards agreement covering such work in Louisiana does not require production companies to hire through the Union. However, it does provide the Respondent Union with employment opportunities for its members through the roster of qualified employees that is furnished to a producer at the beginning of the hiring process. There is no dispute that

⁹ Short in fact represented the Respondent Union during the investigation and filed the initial answer to the complaint before being replaced as counsel by Mr. Robein.

¹⁰ Although individuals hired by an employer to work within the Respondent Union's geographic jurisdiction are tendered a membership application and dues check-off authorization at time of hire, because Louisiana is a Section 14(b) state, they are not required to sign them as a condition of employment.

this roster is a member's only list.

McHugh admitted that he first met Recio in the Fall of 2009, despite Recio having worked within the Respondent Union's jurisdiction since 2004. McHugh confirmed Recio's testimony that they met while Recio was working on the set of *Battle Los Angeles* and that Recio told McHugh that he wanted to transfer his membership to the Respondent Union. According to McHugh, he told Recio that he would have to get a transfer card and send it to the Respondent Union's office and that he would need to contact the office to get an application packet. According to McHugh, he did not speak with Recio again until after his first period of employment on *The Green Lantern*. McHugh testified that he did not know whether Recio took any steps to effectuate a transfer of his membership in the interim.

McHugh and Woods, the Local Best Boy on *The Green Lantern*, testified consistently that, during Recio's first period of employment on that production, in March, McHugh called Woods and asked Woods to have Recio call him because he wanted to talk to Recio. Woods testified that this is the only time that McHugh has called him to relay such a message to an employee. Upon receiving this call, Woods gave Recio his cell-phone and told him to call McHugh. Woods testified that McHugh did not tell him why he wanted to speak to Recio. Woods denied that McHugh ever told him that Recio was not allowed to work on *The Green Lantern*. McHugh testified that he had sent word to Recio that he wanted to see him because it had just come to his attention that Recio was working on *The Green Lantern* and McHugh realized that Recio had not gotten a work permit yet. McHugh denied telling Woods to pull Recio off the job. According to McHugh, he does not have the authority under the collective bargaining agreement to do that.

McHugh testified that, when Recio came to his office in March, McHugh asked him why he was in Louisiana on another show without having gone through the proper channels to get a work permit. McHugh admitted that he also told Recio that his transfer card had expired. According to McHugh, Recio acknowledged that McHugh was correct regarding his failure to get a work permit. McHugh testified that Recio then volunteered that he had worked in Florida and intended to go back there and return at a later date. At this point, according to McHugh, he reminded Recio that he hadn't yet followed through with his transfer application. McHugh told Recio that, since he was in the office now, he should pick up the application packet from Robin, the clerical who handles membership applications. McHugh advised Recio to complete the paperwork as soon as possible so his application could be brought up at the next membership meeting in April. Although McHugh admitted that he has given verbal permission for other travelers to work in his jurisdiction, he did not give Recio such permission at this meeting because Recio didn't ask for it.

It is undisputed that Recio completed his application and submitted it in time to be voted on at the April meeting. As noted above, the vote to admit Recio was a tie. This came about after one of the members who had roomed with Recio complained that Recio owed him money. McHugh testified that he intended to re-submit Recio's application at the next membership meeting in June. He did not do so because Recio withdrew his application in April.

McHugh confirmed having a telephone conversation with Recio after the April membership meeting during which he informed Recio of the vote and told him that he would be re-submitting Recio's application at the next meeting. McHugh testified that he also suggested that Recio try to have some of his references come to the meeting and speak on his behalf. McHugh corroborated Recio's testimony that, in this conversation, Recio asked if he could go back to work on *The Green Lantern*, and that McHugh gave him permission to do so. According to McHugh, he had no further conversation with Recio after this. McHugh admitted, on cross-

examination by the General Counsel, that he contacted Recio's supervisors, Woods and Dunbar shortly after he learned that Recio had withdrawn his application. Although McHugh did not elaborate on cross regarding the substance of these conversations, it appears these were the calls he described making after his conversation with Mahoney in which he was attempting to find out why Recio was let go.

Woods, the local best boy on *The Green Lantern*, also testified in this proceeding. He was called as a witness by the Respondent Union. Woods is a member of the Respondent Union in addition to having served as an admitted supervisor on the production involved in this proceeding. Woods testified that one of his responsibilities as local best boy was to find local labor as requested by his department head, Kevin Lang. Woods testified that he usually does not go through the Union to find employees. Instead, he calls people he knows from having worked with them. According to Woods, he would only contact the Union for labor as a last resort if there was a call for a large number of employees which he could not fill using his contacts alone.

Woods testified that he has known Recio since they worked together on another movie in 2003. He hired Recio to work on *The Green Lantern*. According to Woods, Recio was hired for "five days or less" as specified in his deal memo. Woods denied that he hired Recio for the run of the show. Woods testified that he did not have the authority to hire someone on those terms. Woods also denied that he fired Recio on March 11. According to Woods, Recio told him on March 11 that he was leaving to go wrestle. While acknowledging that Recio returned to work on April 22, Woods claimed that he could not recall whether Recio called Woods or vice versa. In any event, Recio's return to work, according to Woods, was uneventful.

Woods described Recio's last day of employment on April 28. Woods testified that, at the end of the day, Recio came to him and told him that he couldn't work there anymore, it wasn't worth it. According to Woods, Recio told him that he was going back to Florida to take care of his transfer. Woods testified that Recio also said that he was going to be out of work too long so he was better off going back to wrestling in Pennsylvania. Woods testified further that he asked Recio to re-consider. He also recalled that Recio seemed distraught as if someone on the job had bothered him. Again, Woods denied that he fired Recio or told him that he couldn't work there anymore. Woods also denied that anyone for the Respondent Employer ever instructed him to fire Recio. Woods also testified that the only time McHugh ever talked to him about Recio was the one time, in March, that McHugh asked Woods to have Recio call him.

B. Analysis

The consolidated complaint alleges that the Respondent Union, in violation of Section 8(b)(1)(A) and (2) caused the Respondent Employer to discharge Recio on two occasions because he was not a member of the Respondent Union, and that the Respondent Employer violated Section 8(a)(1) and (3) by acquiescing in the Respondent Union's demand to discharge Recio. The consolidated complaint also alleges that the Respondent Union violated Section 8(b)(1)(A) by McHugh telling Recio he could not work within the Respondent Union's jurisdiction because he was not a member of the Respondent Union and that the Respondent Employer violated Section 8(a)(1) by Woods telling Recio that he could not work on *The Green Lantern* because he was not a member of the Respondent Union. Because Recio was a member of another local of the International Union, this is not a case of discrimination between union members and non-members. Rather, it is a case where the General Counsel alleges that a local union causes an employer to discriminate against members of other locals, or "travelers" in order to favor members of the respondent union local. As both the Respondent's correctly point out, General Counsel bears the burden of proving every allegation of the consolidated

complaint. *Blue Flash Express, Inc.*, 109 NLRB 591, 592 (1954). Because the only witness called by the General Counsel is Recio, the Charging Party, this case rises or falls on his credibility.

5 A Union that operates a non-exclusive hiring hall, such as the Respondent Union here, will be found to violate Section 8(b)(1)(A) and (2) when it interferes with an individual's attempt to work due to the individual's membership status. An employer that complies with a union's efforts to deny employment to an individual on that basis will be found to violate Section 8(a)(1) and (3). *Kvaerner Songer, Inc.*, 343 NLRB 1343, 1346 (2004); *Carpenters Local 2369 (Tri-State Ohbayashi)*, 287 NLRB 760, 763 (1987). See also *R-M Framers, Inc.*, 207 NLRB 36 (1973). The General Counsel points out that the Respondent Union has already been found to have violated the Act in similar fashion with respect to two other individuals because they did not have valid work permits. *International Alliance of Theatrical Stage Employees Local 478 (LT Productions, LLC)*, 2010 WL 561889 (JD(ATL)-3-10, Feb. 9, 2010). Judge Brakebusch's decision in that case was not appealed to the Board. Although I may take official notice of the decision, it is not considered binding precedent. In any event, there are significant factual differences between that case and the instant one.

20 There is no dispute that the Respondent Employer hired Recio to work on *The Green Lantern*, and that his employment ended March 11 after just four days. There is also no dispute that McHugh, the Respondent Union's business agent, placed a telephone call to Recio's supervisor, Woods, shortly before Recio's employment ended. Although McHugh and Woods claim that McHugh merely asked Woods to have Recio contact him, there is no dispute that the reason McHugh wanted to talk to Recio was because he had just learned that Recio was working without a valid work permit. Recio testified that Woods told him on March 11 that he had to let him go and that he could not work until his "paperwork" was straightened out. Recio claims that Woods also said that McHugh could make Woods life difficult. If credited, this conversation would establish the unlawful motive behind Recio's first termination. Woods, however, denies saying anything about McHugh or Recio's membership status during their brief conversation on March 11. According to Woods, it was Recio who told him that he was leaving the job to pursue opportunities in professional wrestling. Thus, Woods denies that Recio was terminated. Recio admitted saying he would seek work as a wrestler but claims he only did so after he was told he could no longer work on *The Green Lantern*.

35 Recio's testimony regarding the March 11 conversation with Woods is supported by subsequent events. Thus, as requested by McHugh, Recio went to the union office to speak with him on March 17. McHugh admits that in that conversation, he raised the issue of Recio having worked on three productions since they met without obtaining permission from the Respondent Union. This admission clearly establishes McHugh's belief that, in order to work in Louisiana, Recio needed the Respondent Union's approval. Both Recio and McHugh agree that they also discussed Recio's transfer application in this meeting. There is no dispute that soon after the meeting, Recio completed the transfer application and paid his \$450 transfer fee. He also secured a local residence in New Orleans, signing a lease, indicating his desire to transfer residency from Florida to Louisiana. It is doubtful he would have taken these steps had he intended to pursue work as a professional wrestler.

50 Both the Respondents rely on the fact that Recio was hired as a daily employee, not for the run of the show, indicating there was no guarantee of future employment. Although Recio testified that Gaffer Lang and Local Best Boy Woods told him he was being hired for the run of the show, the deal memo he signed makes clear that any such guarantee is meaningless. At the same time, Recio left his employment on *Earthbound* before the production was over in order to take the job on *The Green Lantern*, which was expected to run a long time. It's unlikely he would

have done this unless he was expecting to work for more than 5 days.

With respect to the March 11 termination, I have decided to credit Recio's testimony regarding his conversation with Woods. Woods reference to Recio's paperwork and his statement about McHugh, made shortly after he admittedly spoke to McHugh about Recio, establishes the causation between the Respondent Union's "demand" and the Respondent Employer's action. As the General Counsel argues, the Board has consistently held that unlawful interference by a union in an employee's employment need not be shown by an express request, demand, or threat. *Local Union No. 441, IBEW (Otto K. Oleson Electronics)*, 221 NLRB 214 (1975); *Northwestern Montana District Council of Carpenters' Unions (Glacier Park Co.)*, 126 NLRB 889, 897 (1960). See also *Stage Employees IATSE Local 665 (Columbia Pictures)*, 268 NLRB 570, 572 (1984). Here, Woods statement that Recio had to get his paperwork straightened out is evidence that McHugh's concerns over Recio's lack of a work permit caused his termination. Because the Respondent Employer insisted throughout that Recio had voluntarily quit, which I find not supported by the credible evidence, no other reason for his abrupt termination was offered.

I find that General Counsel has met the burden of proving that the Respondent Union caused Recio's termination on March 11 and that the Respondent Employer terminated Recio at the request of the Respondent Union. I thus find that Respondents have violated Section 8(b)(1)(A) and (2) and Section 8(a)(3), respectively, as alleged in the complaint. I find further that Woods statement to Recio on March 11, that he could not work until his paperwork was straightened out violated Section 8(a)(1), as alleged. *R-M Framers, Inc.*, 207 NLRB Supra, at 43-44. See also *United States Postal Service*, 345 NLRB 1203, 1217 (2005).

The consolidated complaint also alleges that the Respondent Union, through McHugh, violated Section 8(b)(1)(A) by statements McHugh made to Recio during their March 17 meeting. Recio testified, after some prodding by the General Counsel, that McHugh told him he would not be allowed to work until he completed his transfer application. McHugh admitted asking Recio why he was working again in Louisiana without a work permit. He also admitted telling Recio that he should complete his transfer application while he was there in the office. He did not admit making the statement alleged in the complaint or attributed to him by Recio. While not free from doubt, I shall credit Recio's version of the conversation because the statement he recalled, after his memory was refreshed, is consistent with the other statements McHugh admitted making during this meeting. The clear intent of the meeting, which McHugh claims he requested, was to ensure Recio either obtained his permission to work in Louisiana, or completed the transfer of his membership to the Respondent Union. Either requirement is inconsistent with the Respondent Union's duty under the Act, in the context of a non-exclusive hiring hall, not to interfere with an employee's employment based on union membership or support. Accordingly, I find that the Respondent Union violated Section 8(b)(1)(A) of the Act on March 17 as alleged in the complaint.

The consolidated complaint alleges that the Respondent Union coerced Recio into turning down job offers from "various employers" after his March 13 termination from *The Green Lantern*. Recio's testimony at the hearing established that there was only one such job offer, from Ferdinand Duplantier, a local best boy he had worked for on another production. According to Recio, Duplantier called him and offered him work on the movie *Drive Angry*. Recio could not recall the date he received this job offer. He testified that he told Duplantier that McHugh told him he could not work until his paperwork was "straight." Because Recio's response to this job offer is based on what I have already found to be a coercive statement made by McHugh at the March 17 meeting, I conclude that his rejection of the offer was coerced by the Respondent Union's unlawful conduct.

The events leading up to Recio's second termination are murkier and more difficult to resolve. There is no dispute that, after his meeting with McHugh, Recio attempted to straighten out his paperwork by pursuing his application for a transfer. It is also undisputed that, when the members of the Respondent Union did not vote to accept his application (the vote ending in a tie), McHugh gave Recio permission to work on *The Green Lantern* pending re-submission of his application at the next membership meeting in June. In fact, Woods re-hired Recio in April, after the tie vote on his application. Recio's re-employment ended after just four days. Unlike the first termination, Recio does not recall Woods giving him any reason or making any reference to McHugh, Recio's membership status or any other statements that might give rise to an inference that the Respondent Union caused this second termination. The only evidence General Counsel points to in support of this allegation is the coincidental timing between Recio's withdrawal of his transfer application and his termination. Although McHugh testified that he called Woods and Dunbar after learning of Recio's withdrawal, he also testified that he made these calls in response to communication from Dan Mahoney regarding a complaint made by Recio to the International Union. McHugh could not recall whether he made the calls before or after Recio left employment for the second time. There is no other evidence in the record that would establish that this communication between McHugh and the Respondent Employer's supervisors occurred before April 28, Recio's last date of employment. There is also no evidence in the record to contradict McHugh's testimony that he called Woods and Dunbar to find out if Recio was having any problem on the job.

In addition to the lack of evidence of union causation of the second termination, there is testimony from Recio suggesting he voluntarily relinquished employment and moved back to Florida for financial reasons. He testified that he withdrew his transfer application and requested a refund of his initiation fee, before he returned to work on *The Green Lantern*, because he needed the money. He testified that it was becoming too expensive to maintain two residences, one in New Orleans to qualify for a membership transfer, and the other for his family in Florida. Although Recio claimed the Respondent Union was preventing him from working in Louisiana, which led to his financial problems, it is undisputed that he was re-hired by Woods after requesting a refund because he needed money. It is also undisputed that whatever impediment to employment existed between his March 11 termination and his re-employment in late April was removed on April 12 when McHugh gave him verbal permission to continue working in Louisiana while his application was pending. Recio also testified that, after making his second complaint to the International on May 3, the International's attorney told him to go back to work in Louisiana and to call him if he had any problems. Recio admittedly did not comply with these instructions. Thus, it appears any loss of work after Recio's April 12 conversation with McHugh was not caused by the Union but instead by Recio's voluntary decision to return to Florida for financial reasons.

As noted previously, this case is factually distinct from the case involving the Respondent Union decided by Judge Brakebusch. In that case, the General Counsel had testimony from representatives of the employer clearly establishing the Respondent Union's causation of the employer's decision to rescind employment offers for two non-members. These witnesses directly contradicted the testimony of McHugh and Union president LoCicero, who testified in that proceeding. There is no such contradictory testimony here with respect to the April 28 termination. All that the General Counsel has in this case to link Recio's April 28 termination of employment to the Respondent Union is speculation and conjecture. Accordingly, I find that, with respect to Recio's second termination by the Respondent Employer, that the General Counsel has not met the burden of proof that either the Respondent Union or the Respondent Employer violated the Act as alleged in the complaint.

Conclusions of Law

1. By causing Respondent Employer to discharge Humberto Recio on March 11, 2010, the Respondent Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

2. By acquiescing in Respondent Union's request to discharge Recio, Respondent Employer discriminated against its employees on the basis of union membership in violation of Section 8(a)(1) and (3) and committed unfair labor practices affecting commerce within the meaning of section 2(6) and (7) of the Act.

3. By telling Recio on March 11 that he was being terminated because of the Union, Respondent Employer engaged in unfair labor practices affecting commerce within the meaning of section 8(a)(1) an Section 2(6) and (7) of the Act.

4. By telling Recio on March 17 that he would not be allowed to work within its jurisdiction until he completed his transfer application, the Respondent Union restrained and coerced employees in the exercise of their section 7 rights and engaged in unfair labor practices affecting commerce in violation of Section 8(b)(1)(A) and section 2(6) and (7) of the Act.

5. By causing Recio to turn down employment opportunities because of the above coercive conduct, the Respondent Union has engaged in unfair labor practices affecting commerce in violation of section 8(b)(1)(A) of the Act.

6. Respondent Employer and the Respondent Union have not engaged in any other unfair labor practices alleged in the complaint.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because the production of *The Green Lantern* ended in August 2010, I shall not require Respondent Employer to offer reinstatement to Recio at this time. However, the Respondent Employer and the Respondent Union shall be jointly and severally liable to make him whole for any loss of earnings and benefits resulting from his unlawful termination on March 11, 2010. Because I found that the Respondents did not commit any unfair labor practice in connection with Recio's termination of employment on April 28, the backpay period shall be tolled effective April 22, the date he was re-hired to work on *The Green Lantern*. Backpay shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest to be compounded daily in accordance with the Board's decision in *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 4-5 (October 22, 2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In addition, because I have found that the Respondent Union's coercive conduct caused Recio to turn down interim employment after unlawful termination on March 11, I shall recommend that the Respondent Union be ordered to make him whole for any wages and benefits he would have earned had he accepted the offer to work on *Drive Angry*, to be computed in the same manner with interest compounded daily.

Because work has ended on the production at issue here, I shall recommend, in addition to the traditional notice posting remedy, that the Respondents mail a copy of the notice to all employees working on *The Green Lantern* on and after March 11, 2010. I shall also recommend that the attached notices be distributed electronically if, at the compliance stage, it

is determined that either or both Respondents utilize that means of communicating with employees or members. *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 3-4 (October 22, 2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Big Moose, LLC, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they were not allowed to work until they straightened out their membership issues with International Alliance of Theatrical Stage Employees Local 478 (the Union).

(b) Discharging or otherwise discriminating against any employee, at the request of the Union, based on the employee's membership status with the Union

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Humberto Recio whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful March 11 discharge of Recio, and within 3 days thereafter notify Recio in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in New Orleans, Louisiana, copies of the attached notice marked "Appendix A."¹² Copies of the notice, on forms

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Orders shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If these Orders are enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of

Continued

provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(e) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix A,¹³ at its own expense, to all employees in the unit represented by the Union who were employed by the Respondent at its *Green Lantern* job in the New Orleans, Louisiana area at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent Employer's authorized representative.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

ORDER

The Respondent, International Alliance of Theatrical Stage Employees Local 478, New Orleans, Louisiana, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Telling employees that they are not allowed to work within the Union's jurisdiction until they have completed a transfer application.

(b) Causing, or attempting to cause, an employer to discriminate against any employee in violation of Section 8(a)(1) and (3) of the Act.

(c) Causing employees to decline work opportunities because they are not members of the Union

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

the National Labor Relations Board."

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Humberto Recio whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days after service by the Region, post at its union office in New Orleans, Louisiana, copies of the attached notice marked "Appendix B."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(c) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix B,¹⁵ at its own expense, to all employees of Big Moose, LLC in the unit represented by the Union who were employed by Big Moose, LLC at its *Green Lantern* production in the New Orleans, Louisiana area at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent Union's authorized representative.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 2, 2012

Michael A. Marcionese
Administrative Law Judge

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell you that you are not allowed to work until you straighten out your membership issues with International Alliance of Theatrical Stage Employees Local 478 (the Union).

WE WILL NOT discharge or otherwise discriminate against you, at the request of the Union, based on your membership status with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Humberto Recio whole for any loss of earnings and other benefits resulting from his March 11, 2010 discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Recio's unlawful March 11, 2010 discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BIG MOOSE, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 South Maestri Place, Seventh Floor

New Orleans, Louisiana 70130-3413

Hours: 9 a.m. to 5:30 p.m.

504-589-6361.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 504-589-6389.

APPENDIX B

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT tell you that you are not allowed to work within our jurisdiction until you have completed a transfer application.

WE WILL NOT cause, or attempt to cause, any employer to discriminate against you based on your membership in another union.

WE WILL NOT make statements or engage in any other conduct that coerces any employee to decline work opportunities because they are not a member of the Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Humberto Recio whole for any loss of earnings and other benefits suffered as a result of his March 11 discharge by Big Moose, LLC that we caused and for any loss of earnings and other benefits resulting from his refusing work opportunities because of our coercive statements and conduct toward him.

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES LOCAL 478

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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